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89 - No. 1479

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

KEITH SMITH,

Petitioner,

vs.

BALTIMORE CITY POLICE DEPARTMENT AND COMMISSIONER, BALTIMORE CITY POLICE DEPARTMENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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47 pp

QUESTION PRESENTED

Should a government agency be pemitted to use evidence in an agency disciplinary hearing which was obtained by the agency in violation of the bill of rights?

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No.

In The

Supreme Court of the United States

October Term, 1989

KEITH SMITH,

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vs.

BALTIMORE CITY POLICE DEPARTMENT AND COMMISSIONER, BALTIMORE CITY POLICE DEPARTMENT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

OPINIONS BELOW

On April 13, 1987 a Baltimore City Police Department Disciplinary Hearing Board issued its judgment and recommendations, reproduced at 12a, which recommended the termination of Officer Smith. On April 21, 1987 the Commissioner of the Baltimore City Police Department issued Personnel Order

308-37, reproduced at 9a, which terminated Officer Smith's employment with the Baltimore City Police Department.

On September 9, 1988 the Circuit Court for Baltimore City issued an order affirming the Commissioner's decision, reproduced at 8a.

On September 14, 1989 the Court of Special Appeals of Maryland filed an unreported opinion affirming the Circuit Court's judgment, reproduced at 2a. On October 21, 1989 the petitioner filed a timely petition for a writ of certiorari in the Court of Appeals of Maryland. On December 20, 1989 the Court of Appeals issued an order denying the petitioner's petition, reproduced at 1a.

STATEMENT OF JURISDICTION

The order of the Court of Appeals of Maryland denying the petitioner's petition for a writ of certiorari was issued on December 20, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment V which states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On May 6, 1983 the respondent Baltimore City Police Department served the petitioner, Police Officer Keith Smith, with a notification of complaint which alleged that Smith had, on May 3, 1983, violated Department rules and regulations regarding misconduct and the use of a controlled dangerous substance. On the same day, Smith was ordered to submit to a urinalysis test which was to be used for administrative purposes. After objecting to the submission of a urine sample, Smith submitted a sample under threat of punishment for failure to do so, including possible termination. On June 6, 1983, Officer Smith was requested to give a statement to the Department's Internal Investigation Division. At this time it was still possible that Smith could be criminally charged. It was explained to Smith and his counsel that if Smith refused to give the statement he would be ordered to do so, and if he refused to obey the order he would be subject to disciplinary action which potentially included termination. After being so advised by the Department, Smith gave a statement.

On April 8 and 9, 1987, a departmental disciplinary hearing was held at which the statement and the results of the urinalysis

were admitted into evidence over the objection of Smith's counsel. Smith's counsel had objected that admission of the statement would violate Smith's Fifth Amendment rights against self-incrimination (E.62, 63). The board chairman overruled Smith's objection (E.63). The hearing board found Smith guilty of three counts of misconduct and one count of using controlled dangerous substances and recommended that Smith's employment be terminated. On April 21, 1987 the Police Commissioner issued an order terminating Smith's employment.

Smith filed a timely appeal to the Circuit Court for Baltimore City. In both a pre-hearing memorandum and at oral argument, Smith argued that the use of the statement at the hearing violated his rights under the Fifth Amendment to the United States Constitution (E.302-317, 326-329). In the memorandum, it was noted that Smith objected to submitting to the urinalysis. The Circuit Court affirmed the Police Commissioner's decision without comment on Smith's federal constitutional claims.

Smith filed a timely appeal to the Court of Special Appeals of Maryland. Smith raised the federal constitutional claims in his brief and at oral argument. The Court of Special Appeals affirmed the Circuit Court's decision and held that no federal constitutional violations had occurred. Smith filed a timely petition for writ of certiorari with the Court of Appeals of Maryland which raised the federal constitutional issues. On December 20, 1989 the petition was denied without comment.

REASONS FOR GRANTING THE WRIT

A GOVERNMENT AGENCY SHOULD NOT BE PERMITTED TO USE EVIDENCE IN AN AGENCY DISCIPLINARY HEARING WHICH WAS OBTAINED BY THE AGENCY IN VIOLATION OF THE BILL OF RIGHTS.

The decision below allows government agencies to obtain evidence in violation of the Bill of Rights and use the evidence against its employees in agency disciplinary hearings which subject the employees to potential termination. The issue involved in this case is one of substantial importance because it could affect the rights of thousands of individuals employed by federal and state governments and, indeed, the rights of all citizens who may at some time face charges before an administrative agency. Dicta in the opinions of this Court and decisions of cases in the lower federal courts indicate that a government agency may not use evidence illegally obtained by the agency in its own hearing. Thus, a decision by this Court would clarify the status of the law in regard to this issue of substantial importance.

A. The Decision Below, Holding That The Petitioner's Statement And Urinalysis Were Not Illegally Obtained, Conflicts With The Principles Essential To Decisions Of This Court Which Have Addressed Such Questions.

By denying Keith Smith's petition for a writ of certiorari, the court below failed to correct the decision of the Court of Special Appeals of Maryland which held that none of Smith's rights under the United States Constitution was violated.

In *Griffin v. California*, 380 U.S. 609, *reh. denied*, 381 U.S. 957 (1965) this Court stated that the imposition of any penalty

for the exercise of a constitutional right is prohibited because it "cuts down on the privilege by making its assertion costly." *Id.* at 614. Subsequent decisions of this Court make it clear that this axiom applies to cases such as Smith's.

In *Garrity v. New Jersey*, 383 U.S. 493 (1967), police officers were interrogated for an alleged conspiracy to obstruct the administration of traffic laws. The officers were informed that, although they had a right not to answer, if they exercised their right to remain silent, they would be subject to removal from office. The officers answered the questions, their answers were admitted into evidence in their subsequent criminal trials on conspiracy charges, and they were convicted. *Id.* at 494-95. This Court held that the officers were not "relegated to a watered-down version of constitutional rights" and emphasized that the state does not have the authority to cause anyone to pay a price or suffer a penalty for the exercise of those rights provided by the United States Constitution. *Id.* at 500. In *Spevak v. Klein*, 383 U.S. 511 (1967), the companion case to *Garrity*, it was held that an attorney could not be disbarred for his refusal to testify at a judicial inquiry, stating that "threat is indeed as powerful an instrument of compulsion as the use of legal process to force from the lips . . . the evidence necessary to convict." *Id.* at 516.

One year after the *Garrity* decision, this Court decided *Gardner v. Broderick*, 392 U.S. 273 (1968). In *Gardner*, a police officer was advised of his constitutional rights and further advised that, if he did not waive his right to remain silent and waive immunity from prosecution, he would be fired. He refused to waive his constitutional rights and was discharged solely for that refusal. *Id.* at 274-75. Recognizing that the facts of the case went beyond *Garrity*, this Court framed the issue as "whether a policeman who refuses to waive the protections which the privilege gives him may be dismissed from office because of that refusal." *Id.* at 276. This Court found in favor of the officer and stated that

> [T]he mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment. It is clear that petitioner's testimony was demanded . . . in part so that it might be used to prosecute him, and not solely for the purpose of securing an accounting of his performance of his public trust. If the latter had been the only purpose, there would have been no reason to seek to compel petitioner to waive his immunity.

Id. at 278-79.

In the instant case, the standards as set forth in *Garrity* and *Gardner* should be applicable because the investigation pertained to alleged actions which could have subjected Officer Smith to criminal proceedings. Even if this particular investigation could not have led to a criminal charge, Smith may still have an absolute right to assert his Fifth Amendment privilege against compelled self-incrimination. While this Court has never ruled that such an absolute privilege exists, it has held, in a case where no criminal proceedings could have been possible, that a state employee's exercise of constitutionally protected rights cannot adversely affect the employee in a decision regarding his employment status. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 285-86 (1977). It should be noted that neither *Garrity* nor *Gardner* require identical charges in the administrative and criminal contexts. Otherwise, a Department could simply call the criminal charge by another name, alter elements slightly, and then circumvent the constitutional protections.

However, the extent to which a Department may compel statements has not been established with any degree of clarity

or consistency. Some cases have held that an agency may not use compulsion to force an employee to produce self-incriminating evidence unless the employee has been assured that such evidence will not be used against him in criminal proceedings. *Mack v. United States,* 814 F.2d 120 (2nd Cir. 1987); *Benjamin v. City of Montgomery,* 785 F.2d 959 (11th Cir. 1985); *Erwin v. Price,* 778 F.2d 668 (11th Cir. 1985); *Hester v. City of Milledgeville,* 777 F.2d 1492 (11th Cir. 1985), *reh. denied,* 782 F.2d 180; *Weston v. U.S. Dept. of Housing and Urban Development,* 724 F.2d 943 (Fed. Cir. 1983); *Devine v. Goodstein,* 680 F.2d 243 (D.C. Cir. 1982); *Kalkines v. United States,* 473 F.2d 1391 (Ct. Cl. 1973). Other cases have held that such compulsion without assurance that the evidence will not be used in criminal proceedings does not violate the Fifth Amendment. *Gniotek v. City of Philadelphia,* 808 F.2d 241 (3rd Cir. 1986), *cert. denied,* ____ U.S. ____, 107 S. Ct. 2183 (1987); *United States v. One 1985 Plymouth Colt Vista,* 644 F. Supp. 1546 (N.D. Ill. 1986). A decision by this Court could clarify the circumstances under which law enforcement officers can be required to surrender their constitutional rights.

Similarly, this Court could clarify the circumstances under which an individual police officer can be subjected to a drug test without a warrant. In both *National Treasury Employees Union v. Von Raab,* ____ U.S. ____, 109 S. Ct. 1384 (1989) and *Skinner v. Railway Labor Executives Ass'n.,* ____ U.S. ____, 109 S. Ct. 1402 (1989), this Court made clear that drug testing, even by an employer, fell within the protections of the Fourth Amendment. Except in cases of routine drug testing, which is clearly not involved in this case, such a search requires a warrant. In this case the respondents, without acquiring a warrant, ordered Smith to submit to a drug test which was given after Smith's objection. Such an action is of such substantial importance that this Court should hear this case to clarify the status of its legality.

B. The Decision Below, Allowing An Administrative Agency To Obtain Evidence Illegally From An Employee And Use That Evidence Against The Employee In An Agency Disciplinary Proceeding, Is In Conflict With Principles Essential To Decisions By This Court And With Holdings In The Lower Federal Courts.

The decision below, if not changed, will allow government agencies to illegally obtain evidence from their employees and use it against their employees in agency disciplinary hearings. The argument that the exclusionary rule should apply to these proceedings was rejected below, creating a conflict with the essential principles of some of this Court's prior decisions. This Court has restricted the non-criminal application of the exclusionary rule to those circumstances where its deterrent function would most likely be significant and efficient. *United States v. Janis*, 428 U.S. 433, 453-54 (1976). In *Janis*, Los Angeles police seized $4,490 in cash and gambling paraphernalia pursuant to a search warrant that was subsequently deemed invalid. Although the State of California was forced to abandon criminal charges against Janis for violating gambling laws, the Internal Revenue Service, basing its claim on the illegally obtained evidence, made an assessment against Janis in federal court for his undisclosed income from gambling. This Court held that "the judicially created exclusionary rule should not be extended to forbid the use in the civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign." *Id.* at 459-60. The Court based its holding on the fact that the deterrent function of the exclusionary rule would not be served in intersovereign situations, stating "common sense dictates that the deterrent effect of the exclusionary rule is highly attenuated when the punishment imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or against a different sovereign." *Id.* at 457-58. Thus, the Court concluded that "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement

officer [does] not have a sufficient likelihood of deterring the conduct of state police so that it outweighs the societal costs imposed by the exclusion." *Id.* at 454. Implicit in the holding in *Janis* is that the exclusionary rule is appropriate in civil proceedings when it is likely to deter improper behavior in the future.

The facts of this case provide a more compelling argument for use of the exclusionary rule in a civil proceeding because, unlike *Janis*, the same sovereign, in fact the same government agency, would be prevented from using the evidence that it illegally obtained. Use of the exclusionary rule would be consistent with the articulated purpose of the rule, which is "to compel respect for . . . constitutional guarante[es] in the only effectively available way—by removing the incentive to disregard [them]." *Elkins v. United States*, 364 U.S. 206, 217 (1960).

Decisions in the lower federal courts are consistent with the view submitted by Smith above. In *Tirado v. C.I.R.*, 689 F.2d 307 (2d Cir. 1982), the court refused to extend the exclusionary rule to a civil proceeding involving an intrasoverign violation. Like *Janis*, *Tirado* concerned a civil claim made by the Internal Revenue Service for deficiencies in Tirado's income tax returns. The claim was founded upon evidence obtained pursuant to a search warrant by agents of the Federal Bureau of Narcotics who were conducting an investigation into Tirado's narcotic activities. *Id.* The Court of Appeals upheld the tax court's decision, holding that the exclusionary rule was inapplicable in the subsequent federal civil tax proceeding because the deterrent purpose of the rule would not have been served by applying it to a proceeding, unlike Smith's case, in which the officers who committed the illegal acts did not have any interest. *Id.* at 315. Thus, while the exclusionary rule was held inapplicable in the civil proceeding in *Tirado*, the dichotomy discussed above was recognized by the court.

Other federal courts have held the exclusionary rule applicable in civil proceedings in which the same agency that acted illegally attempted to use the illegally obtained evidence. In *Pizzarello v. United States*, 408 F.2d 579 (2d Cir. 1969), the Second Circuit applied the exclusionary rule to invalidate a tax assessment that was based substantially, if not completely, on illegally obtained evidence. Evidence seized by Special Treasury Agents of the Internal Revenue Service pursuant to an arrest that was effectuated based on an invalid arrest warrant was suppressed at a criminal trial. Nevertheless, the I.R.S. continued to pursue its civil tax assessment against Pizzarello. The issue presented to the court was whether evidence unlawfully obtained by an agency for use in criminal proceedings should be barred by the exclusionary rule in subsequent civil proceedings which are initiated by the same agency that committed the constitutional violation. *Id.* at 584-86. The court held that the exclusionary rule applied, finding that, "absent an exclusionary rule, the government would be free to undertake unreasonable searches and seizures in all civil cases without the possibility of unfavorable consequences." *Id.* at 586. Thus, the reason underlying the holding in *Pizzarello* was the deterrent effect of the exclusionary rule.

In a case analytically similar to the instant case, the exclusionary rule was held applicable to a college disciplinary hearing where college officials obtained evidence during an illegal search of students' dormitory rooms. *Smyth v. Lubbers*, 398 F. Supp. 777 (W.D. Mich. 1975). The deterrent effect of the exclusionary rule was the reason given by the court to provide college officials with an incentive to respect the privacy of its students. *Id.* at 794.

The issue presented by this case has never been specifically addressed by this Court. A decision by this Court would clarify the status of the exclusionary rule in the administrative context. Such a decision could prevent abuse of constitutional protections

by government agencies who will continue to attempt to illegally obtain evidence and use it against their employees. This attitude was expressed by counsel for the Police Department at the oral argument before the Circuit Court when he argued that the Department's actions are justified because there "is no law which says you can't" use evidence which the user illegally obtained. Further, a decision by this Court would force state courts to address alleged constitutional violations, rather than ignore such arguments as was done below.

CONCLUSION

For the foregoing reason, the petitioner Keith Smith respectfully requests that a writ of certiorari be issued to the Court of Appeals of Maryland.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX A — ORDER OF THE COURT OF APPEALS OF MARYLAND DATED DECEMBER 20, 1989

In the
Court of Appeals
of Maryland

Petition Docket No. 422

September Term, 1989

(No. 38, September Term, 1989
Court of Special Appeals)

KEITH SMITH

v.

BALTIMORE CITY, MD., et al.

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

s/ Robert C. Murphy
Chief Judge

Date: December 20, 1989

APPENDIX B — OPINION OF THE COURT OF SPECIAL APPEALS OF MARYLAND DATED SEPTEMBER 14, 1989

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 38

September Term, 1989

KEITH SMITH

v.

BALTIMORE CITY, MARYLAND, ET AL.

Gilbert, C.J.
Bell, R.B.,
Getty, James S. (retired,
specially assigned),
JJ.

PER CURIAM

Filed: September 14, 1989

Upon receiving a complaint that Officer Keith Smith had committed violations of various departmental rules and regulation, as well as using controlled dangerous substances, the Baltimore City Police Department on May 6, 1983 began an internal investigation of Smith. It was not until four years later, April 9, 1987, that a Police Department Hearing Board found Smith guilty of the charges. The Hearing Board recommended Smith's

termination from the force. Police Commissioner Edward J. Tilghman approved the recommendation, and Smith was terminated effective April 22, 1987.

Smith appealed the Commissioner's decision to the Circuit Court for Baltimore City where Judge Meyer M. Cardin affirmed the Commissioner's action. Aggrieved, Smith has journeyed here where he poses three issues for our consideration:

1) Did the Hearing Board err in admitting into evidence the results of an analysis of Smith's urine?

2) Was Smith's statement to Internal Affairs illegally obtained?

3) Is a delay of almost four years from the time of filing hearing violative of due process or laches?

I.

Smith contends that the Police Department Hearing Board erred in admitting into evidence an analysis of his urine. He asserts that there was not only a breakdown in the chain of custody of his urine sample, but that the urinalysis tests used were unreliable and inconclusive.

The Board heard ample evidence as to the training and qualifications of Police Agent Saulsbury who conducted the EMIT (enzyme multiple immunoassay technique) test. Saulsbury testified that, after the EMIT test produced positive results, thus indicating the use of marijuana, the urine sample was sent to National Medical Services (NMS) for a GC/MS (gas chromotography/mass spectrometer) test.

Appendix B

Detective Charles Baker testified that he obtained Smith's urine sample from Agent Saulsbury and personally transported it to NMS, where he handed it to Dr. Richard D. Cohn. Dr. Cohn related to the Hearing Board that he performed the GC/MS confirmatory test. That test, Dr. Cohn said, conclusively proved the existence of marijuana in Smith's urine.

State toxicologist Dr. Yale Caplan told the Board that the procedures and tests used by Agent Saulsbury and Dr. Cohn were in accordance with accepted scientific principles.

In contradiction of the Department's evidence, Smith presented testimony from Dr. Robert Simon. Dr. Simon informed the Board that the documentation in relation to the EMIT test and the chain of custody was inadequate. He said that Agent Saulsbury was not qualified to perform a valid EMIT test, and that the test performed at NMS was inconclusive. Dr. Simon opined that the documentation from NMS indicated that proper clinical procedures were not followed during Smith's urine analysis.

This Court, in reviewing an administrative agency's decision where the agency has correctly interpreted the law, must affirm where there is substantial evidence of record to support the agency conclusion. *Commissioner v. Cason*, 34 Md. App. 487 (1977).

There was, in the matter now before us, substantial evidence supporting the chain of custody of Smith's urine sample. The Department demonstrated, through expert testimony, that the chain of custody and the tests performed on Smith's urine sample followed accepted scientific and legal principles. The Department also showed that there was a reasonable probability that no tampering with the sample occurred. *Brooks v. State*, 24 Md. App. 334, 345 (1975). The evidence produced by Smith, through

his expert witness, Dr. Simon, permitted the Board to assess the credibility of the witnesses and to decide which expert to believe. That it believed those produced by the Department, instead of Smith's witness, does not constitute error.

Smith argues that the EMIT and GC/MS tests were inconclusive and/or inadequate. He correctly points out that the EMIT test "has been deemed unreliable when used by itself." *Wilson v. State*, 70 Md. App. 527 (1987). Nevertheless, the *Wilson* Court went on to say that "positive confirmation by a second test bears sufficient indicia of reliability." *Id.* at 534. That is precisely what occurred in the instant case. The EMIT test was confirmed by a GC/MS test. The GC/MS test has been found to be extremely reliable for the detection of the presence and quantity of drugs in urine. The GC/MS test results have been accepted as reliable in other jurisdictions particularly when used as a confirmatory test following a positive EMIT test.[1]

We observe no error in the admission of Smith's urine analysis.

II.

Smith next avers that the statement he gave to the Internal Affairs investigating officers was coerced and is, therefore, inadmissible. We addressed this precise issue in *Nichols v. Baltimore Police Department*, 53 Md. App. 623, 629 (1983). There we said:

---

1. Illinois, Indiana, Kentucky, and Vermont accept the GC/MS confirmatory test as scientifically valid and perhaps the best method of confirmation.

Appendix B

> "The officer who must elect between answering a question or disobeying his commander is in a difficult position, as we have seen, but he or she is not completely defenseless. The LEOBOR [Law Enforcement Officers' Bill of Rights] allows the officer to bring suit against the Department if the officer believes his or her rights have been abridged. § 728(b)(11)."

Smith's statement was not and could not be used against him in any criminal proceeding, nor did any criminal charge emanate from the interrogation. There was no violation of Smith's Fourteenth Amendment due process right. *Id.* at 630. *See also Uniformed Sanitation Men's Association v. Commissioner of Sanitation*, 426 F.2d 619, 629 (1970).

III.

Finally, Smith argues that a delay of approximately four years from the time he was notified of the complaints against him till the time of his administrative hearing was violative of his procedural due process rights and the doctrine of laches. The Department, on the other hand, maintains that Smith either caused or initiated a substantial portion of the delay.

The record fails to disclose how much of the delay in the case, if any, was caused by Smith' s request for injunctive relief and the scheduling problems of counsel. The only possible prejudice to Smith was that a witness, Rhonda, a female with whom Smith was alleged to have had sexual relations, could not be located to testify either for or against him. On oral argument it was conceded that Smith made no effort to move the case to hearing. He seemingly was content to let the matter drag.

Appendix B

Moreover, we observe that Smith was, during the entire period of delay, placed on administrative duty, thus continuing his employment with the Department. Under the circumstances, we conclude that there was no violation of Smith' s due process rights and that the doctrine of laches is inapposite.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

APPENDIX C — ORDER OF THE CIRCUIT COURT FOR BALTIMORE CITY DATED SEPTEMBER 9, 1988

IN THE
CIRCUIT COURT FOR
BALTIMORE CITY

KEITH SMITH

VS.

BALTIMORE CITY POLICE DEPARTMENT
AND
EDWARD J. TILGHMAN

ORDER

The above matter comes before this Court on an Appeal from the Division of the Police Commissioner of Baltimore City, terminating the employment of Keith Smith.

After reviewing the record, transcript, memorandum of Law, and hearing arguments of counsel, this Court finds that there was a genuine dispute of facts before him to support his findings; and that the Decision was not arbitrary or contrary to the Law.

Therefore, it is this 9th day of September, 1988, Ordered by the Circuit Court for Baltimore City, that the Decision of the Police Commissioner be affirmed.

s/ Meyer M. Cardin
Meyer M. Cardin,
Judge

APPENDIX D — PERSONNEL ORDER OF THE COMMISSIONER OF THE BALTIMORE CITY POLICE DEPARTMENT DATED APRIL 21, 1987

Police Department

Baltimore, Maryland

Personnel Order 308-87

April 21, 1987

Subject: Personnel Action, Case of Police Officer Keith L. SMITH,

Personnel Division Casual Section,
Sequence #B591,
EOD 10 May 71

The findings and recommended action of a Departmental Trial Board on April 8, 1987, are as follows:

Charge I,
Specification I . . . .Violation of General Order 48-77, Section IV(B) of Annex A, to wit, - For that at some time prior to May 6, 1983, Police Officer Keith L. Smith indulged in the unlawful use of Controlled Dangerous Substances as defined in the CDS Act.

Charge II,
Specification I . . . .Violation of Rule I, CONDUCT, Section 17, *Ru' and Regulations as specified in General Order 23-78 (now 6-84)*, to wit, - For that on or about June 6, 1983, in a statement given to the members of the Internal Investigation

Appendix D

Division, Police Officer Keith L. Smith made a false statement and/or misrepresented material fact concerning his consumption of Controlled Dangerous Substances.

Charge III,
Specification I . . . .Violation of Rule I, CONDUCT, *Rules and Regulations as specified in General Order 23-78 (now 6-84)*, to wit, - For that at some time prior to May 6, 1983, Police Officer Keith L. Smith indulged in the unlawful use of a Controlled Dangerous Substance, conduct which tended to undermine the good order, efficiency, and/or discipline of the department and/or reflected discredit upon the department and/or himself as a member thereof.

Charge IV
Specification I . . . .Violation of Rule I, CONDUCT, Section 23, (in pertinent part), *Rules and Regulations as specified in General Order 23-78 (now 6-84)*, to wit, - For that at some time prior to May 6, 1983, Police Officer Keith L. Smith neglected his duty in that he failed to take the necessary police action while in the presence of a person or persons who was/were ingesting marijuana, or while in an immediate area where marijuana was being used.

Appendix D

Findings of Trial Board:

Charge I, Specification I	Guilty
Charge II, Specification I	Guilty
Charge III, Specification I	Guilty
Charge IV, Specification I	Guilty

Recommendation by Trial Board:

That Police Officer Keith L. Smith's services with the Police Department be terminated.

Action by Commissioner on April 15, 1987

The recommended action of the Trial Board in the case of Police Officer Keith L. SMITH, Personnel Division, Casual Section, is approved.

Therefore, it is ordered that Police Officer Keith L. SMITH, be and is hereby terminated from the Baltimore Police Department effective April 22, 1987.

s/ Edward J. Tilghman
Edward J. Tilghman
Commissioner

Distribution "C"
Police Officer Keith L. Smith
Members of Disciplinary Board
Mr. Herbert Weiner
Mr. Michael Marshall
Mr. Millard Rubenstein
Plus All Bulletin Boards
Personnel Jacket

APPENDIX E — FINDINGS OF FACT, JUDGMENT, AND RECOMMENDATIONS OF THE DISCIPLINARY HEARING BOARD OF THE BALTIMORE CITY POLICE DEPARTMENT

13 April 1987

POLICE DEPARTMENT
BALTIMORE, MARYLAND

TO:

Police Commissioner Edward J. Tilghman

FROM:

Major Harry A. Sizelove—Chairman
Lt. William L. Pritchett—Member
P. O. Douglas Brimley—Member

SUBJECT:

Disciplinary Hearing Regarding Charges
Against Police Officer Keith Smith
Casual Section Seq. #B591
EOD 10 April 1971 DOB 19 June 1952
SS #219-60-3627

A Disciplinary Hearing to hear charges against Police Officer Keith Smith, Casual Section, Personnel Division, was convened at 1010 hours, 8 April 1987, in Room A348 of the Central District Police Station. All board members were present. Mr. Herb Weiner and Mr. Michael Marshall represented Police Officer Keith Smith. Mr. Millard Rubenstein and Sergeant Richard Puller, Legal Affairs Division, represented the Baltimore Police Department. Ms. Cynthia Tyree, Court Reporter, Betz and Strouse, Inc., 300 Cathedral Street, Suite 500, was the stenographer in attendance.

Mr. Marshall waived the reading of the charges and entered a plea of not guilty on behalf of Police Officer Keith Smith to all charges and specifications.

Appendix E

The chronological sequence of events dealing with convening and adjourning is detailed in Attachment #1. Attachment #2 contains all exhibits and Attachment #3 contains all motions.

Charge 1	Violation of Section IV(B) Annex A of G.0. 48-77
Section IV(B)	No member of this department shall at any time indulge in the unlawful use of Controlled Dangerous Substances as defined in the CDS Act.
Specification 1	For that at some time prior to May 6, 1983, Police Officer Keith L. Smith indulged in the unlawful use of Controlled Dangerous Substances as defined in the CDS Act.
Board Finding	Guilty

Finding of Facts:

With regard to Charge 1, Specification 1, the board, in its consideration, took into account the totality of evidence presented during the hearing.

Detective Sergeant Curtis Murray, Internal Investigation Division, testified he investigated a complaint made to the Internal Investigation Division by Lisa Scott and Rhonda Wilson alleging that Officer Keith Smith, in the presence of the complainants and others, indulged in the use of marihuana at the officer's apartment, 5204 Loch Raven Boulevard, on or about 3 - 4 May 1983.

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Acting upon this complaint, Officer Keith Smith was directed to report to the Medical Section for submission to a screening test for the presence of the chemical THC (Marihuana) in his urine. This test was conducted on 6 May 1983 by Agent David Saulsbury, Medical Section, Personnel Division.

Agent Saulsbury performed the urinalysis in the manner in which he had been trained and certified. Agent Saulsbury had, prior to this testing, performed approximately 1500 tests of this nature. The test, Syva-Emit Test, showed positive for the presence of the chemical THC indigenous to marihuana. Following this test, the balance of the urine specimen was frozen and, under the complete security and control of Agent Saulsbury, maintained at the Medical Section until it could be transported to the National Medical Services, Inc. laboratory, 2300 Shatford Avenue, Willow Grove, Pennsylvania 19090, for confirmation and quantification.

On 11 May 1983, Detective Charles Baker received from Agent Saulsbury the subject specimen, packaged to insure security and preserve its frozen form. The specimen was delivered within four hours to Dr. Richard Cohn of National Medical Services, Inc. The specimen then was tested by that laboratory utilizing the test known as Gas Chromatography/Mass Spectrometry (GC/MS). The test proved positive for the presence of THC, Carboxylic Acid (Marihuana constituent metabolite). The content, 40 nanograms/milliliter of urine, was a sufficient quantity to confirm direct usage of marihuana by Officer Keith Smith. Passive inhalation was ruled out by the volume described in the test result.

During the trial proceeding, both the prosecution and defense introduced expert witnesses. Each's opinions are outlined as follows:

Appendix E

A. Dr. Richard D. Cohn (prosecution):

1. The Syva-Emit Test as conducted by Agent Saulsbury was valid.

2. The specimen's chain of custody was sufficiently documented and attested to by those handling it to preclude tampering or misidentification.

3. Testing of the specimen by both Agent Saulsbury and National Medical Services, Inc. was in keeping with recognized laboratory procedures.

4. The one ion Gas Chromatograph/Mass Spectrometer examination conducted at National Medical Services, Inc. proved with scientific certainty that THC was present in Officer Smith's urine.

5. The quantity of THC present in the specimen (40 nanograms per milliliter) could not have been the result of passive inhalation.

B. Dr. Robert Simon (defense):

1. Agent Saulsbury lacked sufficient expertise to perform a valid Syva-Emit Test.

2. Agent Saulsbury failed to maintain adequate records regarding Officer Smith's screen.

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3. The Syva-Emit Test for Officer Smith was invalid in that only two preparatory sample tests were run on the testing instrument rather than three.

4. Insufficient documentation existed to certify the specimen's chain of custody.

5. Lack of documentation from National Medical Services, Inc. concerning Officer Smith's specimen demonstrated that recognized clinical procedures were not followed in regards to the specimen's analysis.

6. A one ion GC/MS examination cannot conclusively identify THC. In fact, over 500 compounds can be confused with a THC molecule using a one ion test.

7. At the very least, a three ion examination is required to establish certainty. Total certainty can be achieved with full spectrum (18 ions) examination.

8. If 40 nanograms/milliliter of THC were present in a urine specimen, then it would be evidence of active rather than passive ingestion.

C. Dr. Yale Caplan (prosecution rebuttal):

1. The Syva-Emit Test was conducted properly.

2. The specimen was handled according to clinical procedures at all times.

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3. Sufficient documentation and testimony was provided to establish chain of custody.

4. The one ion examination's results introduced and the positive Syva-Emit Test prove the presence of THC in Officer Smith's urine.

5. The level of THC in Officer Smith's urine precludes passive acquisition.

The prosecution introduced Ms. Lisa Scott as a witness. Ms. Scott testified that while in company with Rhonda Wilson, she met Officer Smith and his cousin at the Trailways Bus Station in the evening on or about 3 May 1983. The cousin was meeting his woman friend who arrived on a bus. Following the initial meeting, Lisa Scott, Rhonda Wilson, the cousin and his woman friend accompanied Officer Smith to his Loch Raven Boulevard apartment. On the way, Officer Smith stopped at a package goods store and purchased beer. Lisa Scott stated that after arriving at the apartment, she witnessed Officer Keith Smith and the female, known as Rhonda Wilson, smoke marihuana. She states Officer Smith rolled the material. Lisa Scott further testified Officer Smith and Rhonda Wilson went to bed together during which time a sexual encounter took place. Scott observed this when she "walked in on them".

In their cross-examination of Scott, the defense could not break her statement pursuant to the officer's use of marihuana. The female, Rhonda Wilson, was not introduced by either the defense or the prosecution. She could not be located for this hearing.

The defense introduced Officer Smith's cousin, William

Appendix E

Britain, who testified as to the meeting with Lisa Scott and Rhonda Wilson, the trip to the apartment and the fact that he was there with his woman friend until approximately 10:30 p.m. This confirmed former testimonies but could not refute Scott's testimony pursuant to usage of CDS by Officer Smith and the female, Rhonda Wilson.

Charge 2	Violation of Rule 1, Section 17 No member of the department shall knowingly make any false statement or misrepresentation of any material fact, oral or written, under any circumstances, with the intent to mislead any person or tribunal.
Specification 1	For that on or about June 6, 1983, in a statement given to members of the Internal Investigation Division, Police Officer Keith L. Smith made a false statement and/or misrepresented material fact concerning his consumption of Controlled Dangerous Substances.
Board Finding	Guilty

Finding of Facts:

With regard to Charge 2, the board, in its consideration, took into account the totality of evidence presented during the hearing.

The prosecution entered as Exhibit #3 the statement of Officer Keith Smith taken on 6 June 1983 at the offices of the Internal

Appendix E

Investigation Division. Detective Sergeant Curtis Murray and Detective Gary C. Lembach conducted this statement.

Detective Murray testified to the contents of the statement conducted with the guidance and counseling of Officer Smith's attorney.

Under direct cross-examination by Mr. Millard Rubenstein, Officer Smith, referring to page 11 of the statement, restated his denial made in the statement pursuant to the use of marihuana. This denial, based upon the result of the laboratory positive test findings, would constitute the false statement as charged. Considering the statement in its totality, the officer under advisement of his counsel avoided the issue of sexual contact with the female known as Rhonda Wilson. Officer Smith testified he, in fact, had sexual relations with her in his apartment. This gives credence to the statement of Lisa Scott.

Officer Smith, in his statement, further evaded identification of the visitors in his apartment during this evening and night. He stated he did not recall who the several visitors were, page 9 of the statement, however, during cross-examination, he identified the several visitors as his brother and nephew. It is illogical to believe he could not remember who they were at the time the statement was taken.

Charge 3	Violation of Rule 1, Section Conduct
Rule 1, Conduct	Any breach of the peace, neglect of duty, misconduct or any conduct on the part of any member of the department, either within or without the City of Baltimore, which tends to

Appendix E

undermine the good order, efficiency, or discipline of the department, or which reflects discredit upon the department or any members thereof, or which is prejudicial to the efficiency and discipline of the department, even though these offenses may not be specifically enumerated or laid down, shall be considered conduct unbecoming a member of the Baltimore Police Department, and subject to disciplinary action by the Police Commissioner.

Specification 1 — For that at some time prior to May 6, 1983, Police Officer Keith L. Smith indulged in the unlawful use of a Controlled Dangerous Substance, conduct which tended to undermine the good order, efficiency, and/or discipline of the department and/ or reflected discredit upon the department and/or himself as a member thereof.

Board Finding — Guilty

Finding of Facts:

With regard to Charge 3, Specification 1, the board, in its consideration, took into account the totality of evidence presented during the hearing.

Based upon the testimony of Lisa Scott, the result of the

tests performed by Agent Saulsbury, and tests conducted by the National Medical Services, Inc. laboratories, the board concluded Officer Smith indulged in the use of a Controlled Dangerous Substance. Those testimonies, as described in the prior charges/specifications, brings the board to this determination.

Charge 4	Violation of Rule 1, Section 23, in pertinent part
Section 23; in pertinent part	Failure to stop and perform the necessary police duty while off-duty or on leave shall be considered neglect of duty. Necessary police duty, while off-duty may include but is not necessarily limited to immediately notifying the responsible law enforcement agency or causing such notification, or taking direct police action.
Specification 1	For that at some time prior to May 6, 1983, Police Officer Keith L. Smith neglected his duty in that he failed to take the necessary police action while in the presence of a person or persons who was/were ingesting marihuana, or while in an immediate area where marihuana was being used.
Board Finding	Guilty

With regard to Charge 4, Specification 1, the board, in its consideration, took into account the totality of evidence presented

during the hearing.

Based upon all of the testimonies previously reported in this summary, the board concludes the officer was neglectful in not taking action when he witnessed, as testified to by Lisa Scott, the subject Rhonda Wilson's usage of marihuana.

Testimony in Mitigation:

Police Officer Keith Smith, testifying in mitigation categorically denied his use of any Controlled Dangerous Substances either before or after the event in question.

There were no other mitigation witnesses. Recommended Disciplinary Action:

In considering the appropriate disciplinary action in this matter, the board took into account the guilty findings in these extremely serious charges. His former disciplinary record was reviewed along with his commendations and semi-annual evaluations.

The board unanimously recommended termination.

Respectfully,

s/ Harry A. Sizelove
Major Harry A. Sizelove
Chairman

s/ Lt. Wm. Pritchett
William L. Pritchett
Member

Appendix E

s/ Douglas Brimley
P.O. Douglas Brimley
Member

Appendix E

Attachment #1

Chronology of Trial Board

For Police Officer Keith L. Smith

8 April 1987

1010 hours	Trial Board convened
1230 hours	Recessed
1315 hours	Reconvened
1645 hours	Recessed
1707 hours	Reconvened
1730 hours	Continued to 9 April 1987

9 April 1987

1108 hours	Reconvened
1200 hours	Recessed to await arrival of defense's expert
1340 hours	Reconvened
1515 hours	Adjourned to determine findings
1617 hours	Verdict announced, mitigation
1626 hours	Adjourned to consider punishment

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1652 hours	Recommended action announced
1657 hours	Trial Board concluded

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Attachment #2

Exhibits List

Trial Board of Officer Keith L. Smith

Department

1. Property Receipt and Chain of Custody Form from National Medical Services, Inc.
2. Multiple Mass Chromatogram for Keith Smith.
3. Statement of Officer Keith Smith to I.I.D. on 6 June 1983.
4. Syva-Emit Test results for Keith Smith.

Defense

1. Chain of Evidence Custody Form concerning Officer Keith Smith.
2. Syva-Emit Test results for Keith Smith.
3. Keith Smith's test results from National Medical Services, Inc.
4. Copeis of test results and forms from Metropolitan Police Department.
5. Molecular Weight Chart.
6. American Academy of Forensic Sciences Recommended Guidelines.
7. Letter to Dr. Robert Simon from Dr. Yale Caplan.
8. Various documents including:

   a. S.O.P.—Department of Defense Drug Testing Program.
   b. S.0.P.—Walter Reed Army Medical Center Forensic Toxicology Drug Testing Laboratory.
   c. Quality Assurance Inspection of Compuchem.

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d. National Institute on Drug Abuse Research Monograph Series 7, "Cannabinoid Assays in Humans", 1976.
e. Journal of Analytical Toxicology, Vol. 7, Number 4.
f. Analytical Procedures and Instrumentation.
g. National Institute on Drug Abuse Research Monograph Series 42, "The Analysis of Cannabinoids in Biological Fluids", 1982.
h. Review of Urinalysis Drug Testing Program for the Surgeon General of the U. S. Army, 12 Dec. 1983.
i. Evaluation of Army Urine Prescreen Program, 9 May 1986.
J. Scientific & Technical Guidelines for Drug Testing Programs, 30 Dec. 1986, Dept. of Health & Human Services.

9. Molecular Drawings.

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Attachment #3

Motions During

Trial Board of Officer Keith L. Smith

Defense

1. To dismiss due to lack of speedy trial- denied.

2. To summarily dismiss at conclusion of prosecutions's case— denied.

89- 1479

Supreme Court, U.S.
FILED
APR 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

KEITH SMITH,
Petitioner
v.

BALTIMORE CITY POLICE DEPARTMENT,
and
COMMISSIONER, BALTIMORE CITY POLICE
DEPARTMENT,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE
COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI

NEAL M. JANEY,
CITY SOLICITOR

OTHO M. THOMPSON,
ASSOCIATE CITY SOLICITOR,
Department of Law
101 City Hall
Baltimore, Maryland 21202,
(301) 396-3659,
Attorneys for Respondents.

BEST AVAILABLE COPY

COUNTERSTATMENT OF QUESTION PRESENTED

May an administrative agency, pursuant to its internal investigation, require an officer to give a statement that can be admitted into evidence against the officer at the agency's disciplinary hearing?

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Appendix A - Excerpt of Statement of Keith Smith.....1a

Appendix B - Md. Ann. Code Art. 27 Section 728(7)(ii).....1b

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

KEITH SMITH,

Petitioner,

v.

BALTIMORE CITY POLICE DEPARTMENT
and
COMMISSIONER, BALTIMORE CITY POLICE
DEPARTMENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE
COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Baltimore City Police Department's Trial Board is reproduced in Petitioner's Appendix 9a. The affirming decision of the Circuit Court for Baltimore City is reproduced in Petitioner's Appendix 8a. The affiriming decision of the Maryland Court of Special Appeals is reproduced in Petitioner's Appendix 2a. The Maryland Court of Appeals' decision denying Certiorari is reproduced in Petitioner's Appendix 1a.

COUNTERSTATEMENT OF THE CASE

On May 6, 1983 the Baltimore City Police Department received a complaint alleging misconduct on the part of the Petitioner who was accused of inter alia, using a controlled dangerous substance (marijuana) and engaging

in sexual misconduct with two teenage girls on May 3, 1983. On May 6, 1983, the Petitioner, in conjunction with the investigation that ensued, received and complied with an order to submit to a urinalysis test the results of which were admissible at an administrative hearing but not in any criminal proceeding.

On June 6, 1983 Petitioner was requested to give a statement to the Internal Investigation Division regarding the allegations made against him. At the time the Petitioner's statement was taken, he and his counsel Herbert Weiner were advised and in receipt of a letter from the Baltimore City States' Attorney stating that the States' Attorney declined to proceed criminally against the Petitioner. (See Resp. App. page

26a - Exhibit List, Department No. 3, also Res. Pet. 4a).

The Petitioner was administratively charged with 1) using a controlled dangerous substance; 2) misrepresenting material facts/false statement to the Internal Investigation Division; and 3) misconduct.

On April 8 and 9, 1987, the Police Department held an administrative hearing in which the results of the urinalysis and the Petitioner's statement were admitted into evidence along with the eyewitness testimony of Lisa Scott who said that she saw the Petitioner smoke marijuana on May 3, 1983. (Pet. App. 17a). The hearing board found the Petitioner guilty of misconduct and using a controlled dangerous substance. On April 21,

1987 the Police Commissioner issued an order terminating the Petitioner's employment.

The Circuit Court for Baltimore City affirmed the decision of the trial board on September 9, 1988.

On September 14, 1989, the Maryland Court of Special Appeals affirmed the decision of the Circuit Court. On December 20, 1989, the Maryland Court of Appeals denied Certiorari.

REASONS FOR DENYING THE WRIT

I.

PETITIONER SEEKS TO IMPROPERLY ASSERT NEW ISSUES WHICH WERE NOT RAISED BELOW.

In his appeal of the Police Department's decision to the Circuit Court for Baltimore City and subsequently, Maryland Court of Special Appeals, the Petitioner objected to

the introduction of his urinalysis exam on the grounds that the urinalysis exam and procedures in administering the exam were unreliable. (Pet. App. 3a - Opinion). Now for the first time, the Petitioner asserts that the administration of the exam itself violated his constitutional rights.

Ordinarily, this Court will not decide questions that were not raised or resolved in the lower courts. Youakim v. Miller, 425 U.S. 231 (1976), Singleton v. Wulff, 428 U.S. 106 (1976). The specific issues raised as to the constitutionality of urinalysis are unclear and not squarely presented in this Petition. Since the issues are not squarely presented this Court should deny the Writ. Carlson v. Green, 446 U.S. 14 (1980).

The Petitioner has suddenly alleged a vague constitutional claim based on the admissibility of a urinalysis exam; however he never asserted, argued or presented this claim below. This Court should not entertain a new claim without good cause.

ARGUMENT

II.

THERE IS NO SUBSTANTIAL FEDERAL QUESTION.

The issue that the Petitioner raises is a matter of well settled, established federal law. The Petitioner presents no new important question for this Court to decide.

The Petitioner's basis for this appeal is that statements given to the Internal Investigation Division could have been but were not used against him in a criminal

proceeding. Aside from the fact that any statements could not have been used against him for reasons that will be expanded upon, the Petitioner asks this Court to hear the case based on a hypothetical situation. The Petitioner asks this Court to hear a case based upon a factual scenario that did not occur. The Petitioner does not assert that the Respondent or anyone else attempted to use his statement in a criminal proceeding; rather, he posits that if the statement had been introduced in a criminal proceeding, he would have been harmed.

However, prior to taking his statement, the Police Department advised the Petitioner that the States' Attorney had declined to proceed with criminal charges. (Resp. Appendix

A). Moreover, the Petitioner has the protection of state law which prohibits the use of any compelled statements in any criminal proceeding against a law enforcement officer. Md. Ann. Code Art. 27 Section 728(7)(ii).[1]

The Petitioner further argues that a compelled statement given by a police officer pursuant to an internal agency investigation is, in and of itself, illegal and not admissible in a subsequent agency disciplinary hearing.

Petitioner has failed to cite any legal authority for the proposition that a law enforcement agency may not require statements

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[1] A copy of this section - MD Ann. Code Article 27, Section 728(7)(ii) is attached as Appendix B.

from its officers when conducting an administrative investigation. In Garrity v. State of New Jersey, 383 U.S. 493, 500 this court stated that, "[t]he protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office." Unlike Garrity, in this case, there was no subsequent criminal prosecution nor was there ever a threat of such occurring.

In Gardner v. Broderick, 392 U.S. 273 (1968), a police officer was terminated for failure to waive his right to remain silent and his immunity from prosecution. However, this Court stated that the officer could have been required to "answer questions

specifically, directly, and narrowly relating to the performance of this official duties." Id. at 278; Uniformed Sanitation Men Association v. Commissioner of Sanitation, 392 U.S. 280 (1968).

On remand in Uniformed Sanitation Men's Association v. Commissioner of Sanitation, 426 F. 2nd 619 (1970), Judge Friendly stated at 627:

> "The proceeding here involved no attempt to coerce relinquishment of constitutional rights, because public employees do not have an absolute constitutional right to refuse to account for their official actions and still keep their jobs;

> their right conferred by the Fifth Amendment itself, as construed in Garrity, is simply that neither what they say under such commission nor its fruits can be used against them in a subsequent prosecution."

In Garrity and Uniformed Sanitation Men, the employee was not protected by a statute such as Md.Ann. Code Art. 27 Section 728(7)(ii) which prohibits the discovery or admissibility of compelled statements in criminal proceedings against a police officer.

The principles enunciated in Gardner and Uniformed Sanitation Men were reiterated in Lefkowitz v. Cunningham, 431 U.S. 801(1977). The Court quoting Gardner stated that, "[p]ublic employees may constitutionally be

discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity." Id. at 806.

The Petitioner was never required to waive any constitutional rights.

ARGUMENT

III.

THE COURT SHOULD DENY THE PETITION BECAUSE THERE EXIST INDEPENDENT AND ADEQUATE STATE GROUNDS TO UPHOLD THE DECISION BELOW.

This Court should deny the Petition because, in addition to Petitioner's statement which is the focus of this constitutional challenge, there existed other substantial

evidence to support the lower courts decision upholding the findings by the Police Department trial board. This evidence included the urinalysis test findings and eyewitness testimony of Lisa Scott who saw the Petitioner smoke marijuana.

The Maryland Court of Special Appeals examined the procedures and results of a urinalysis test administered to the Petitioner and determined that there was no error in the admission of the urine analysis. (Pet. App. 5a). As previously stated, the Petitioner did not raise the issue of whether the urine analysis was illegally obtained in any of the proceedings below.

Even without the Petitioner's statement, there was other evidence (i.e. the urine

analysis and eyewitness testimony) which would have satisfied the substantial evidence test applied by the lower courts in their review of the decision. (Pet. App. 2a).

Thus the lower court based its decision on other adequate and independent state grounds rather than solely upon the Petitioner's statement. If a state court decision indicates clearly that it is alternatively based on bona fide, separate adequate and independent grounds the Supreme Court will not undertake to review its decision. Caldwell v. Mississippi, 472 U.S. 320. Since the lower court based its decision on adequate and independent state grounds this Court should deny the Petition.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Neal M. Janey

NEAL M. JANEY
City Solicitor

Otho M. Thompson /by MBH

OTHO M. THOMPSON
Associate City Solicitor
Department of Law
101 City Hall
Baltimore, Maryland 21202
(301) 396-3659

Attorneys for Respondents.

APPENDIX A

EXCERPT OF STATEMENT GIVEN BY KEITH SMITH TO THE INTERNAL INVESTIGATION DIVISION

A. (Attorney, Mr. Herbert Weiner). By giving a statement, I want to record to reflect that Officer Smith is not waving any of his rights under the Law Enforcement Officer's Bill of Rights, or under the United States Constitution, or, the Federal Constitution. I further have been shown a copy of a letter from the State's Attorney's Office of Baltimore city, which indicates that, that office at this time, does not have any intention to proceed criminally with regard to the allegations set forth in this case, is that correct?

APPENDIX B

LAW ENFORCEMENT OFFICERS BILL OF RIGHTS

Article 27, Section 728 (7)(i)(ii)

(7) (i) The law-enforcement officer under interrogation may not be threatened with transfer, dismissal, or disciplinary action.

(ii) This subtitle does not prevent any law-enforcement agency from requiring a law-enforcement officer under investigation to submit to blood alcohol test, blood, breath, or urine tests for controlled dangerous substances, polygraph examinations, or interrogations which specifically relate to the subject matter of the investigation. This subtitle does not prevent a law-enforcement agency from commencing any action which may lead to a punitive measure as a result of a

law-enforcement officer's refusal to submit to a blood alcohol test, blood, breath, or urine tests for controlled dangerous substances, polygraph examination, or interrogation, after having been ordered to do so by the law-enforcement agency. The results of any blood alcohol test, blood, breath, or urine test for controlled dangerous substances, polygraph examination, or interrogation, as may be required by the law-enforcement agency under this subparagraph are not admissible or discoverable in any criminal proceedings against the law-enforcement officer when the law-enforcement officer has been ordered to submit thereto. The results of a polygraph examination may not be used as evidence in any administrative hearing when the law-

enforcement officer has been ordered to submit to a polygraph examination by the law-enforcement agency unless the agency and the law-enforcement officer agree to the admission of the results at the administrative hearing.